No. 15,227

United States Court of Appeals
For the Ninth Circuit

Ernest Mateo, Joseph Oku, Joseph K. Nakila, Joseph Acello, Wade H. Redmon, Harry L. Perry, Herman K. Kapule, Kenton Aichele, William T. Ahia, and James B. Jay, on behalf of themselves and on behalf of other employees of the defendants similarly situated,

Appellants,

vs.

Auto Rental Company, Ltd., and Thacker Transportation Co., Ltd.,

Appellees.

On Appeal from the United States District Court for the District of Hawaii.

REPLY BRIEF FOR APPELLEES.

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FILE
DEC - 5 19
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Subject Index

Page

Jurisdiction 1

Statutory provisions involved 2

Statement of the case 4

Argument 8

I. This action was not commenced as to named plaintiffs, appellants herein, until such time as their written consents to become parties were filed in the District Court below 8

II. The District Court did not err in holding that the certain named employees, appellants herein, who were engaged in operating so-called "airporters" to and from Honolulu Airport (and Port of Honolulu) and the Waikiki area of the City of Honolulu, were engaged in local commerce and were not engaged in commerce within the meaning of the Fair Labor Standards Act of 1938, as amended (29 USCA, Section 201, et seq.) 13

A. The activities of the appellants herein must be viewed against the background of the transportation furnished 15

B. The prebooking or prepayment of ground transportation is not a factor properly relevant to any determination that these appellants can be said to be "engaged in commerce" 18

C. The agreements between the appellees and several airlines do not create such a contractual arrangement with an interstate carrier to thereby establish transportation to and from hotels and the Waikiki and Honolulu areas as an integral stop in the interstate commerce movement 19

D. The fact that the evidence establishes that the "airporters" would pick up or drop passengers virtually anywhere in the Waikiki area, depending upon the accommodation of the streets, further

Page

supports the conclusion that this transportation is essentially local in character 23

E. On the basis of the entire record, the District Court properly found that the employees-appellants herein are engaged in local operations preceding or following interstate travel and that such operations do not constitute an integral part thereof within the meaning of the Act 24

Conclusion 26

Table of Authorities Cited

Cases

Pages

Airlines Transportation Inc. v. Tobin, 198 F. 2d 249 (CA 4, 1952) 19, 20, 21, 23, 25

Burrell v. LaFollette Coach Lines (USDC, Tenn., 1951) 97 F. Supp. 279 ....10, 11, 12

Cederblade v. Parmelee Transportation Co., 94 F. Supp. 965 (N.D. Ill. 1947) 19, 24

Deley, et al. v. Atlantic Box and Lumber Corp. (USDC, NJ, 1954) 119 F. Supp. 727 11

Drabkin, et al. v. Gibbs & Hill Inc. (USDC, SDNY, 1947) 74 F. Supp. 758 10

Lindell v. General Electric Co. (Wash. Sup. Ct., 1954) 267 P. 2d 709 10

MacDonald v. Martinelli (USDC, NY, 1950) 120 F. Supp. 382 11

McLeod v. Threlkeld, 319 U.S. 491, 87 L.Ed. 1538 ....13, 22

Overstreet v. North Shore Corporation, 318 U.S. 125, 129, 87 L. Ed. 656, 660 14

United States v. Capital Transit Company, 338 U.S. 286, 94 L. Ed. 93, 325 U.S. 357 ....24, 25

United States v. Yellow Cab Co., 332 U.S. 218, 231, 91 L. Ed. 2010 ....14, 21, 24, 25

Walling v. Jacksonville Paper Company, 317 U.S. 564, 87 L. Ed. 460 25

Statutes

28 USCA 1291 .... 1, 2

28 USCA 1337 1

29 USCA 201, et seq. (Fair Labor Standards Act, 1938, 52 Stat. 1060) 2, 13

Pages

29 USCA 203(b) 5

29 USCA 207(a) 1, 2, 5, 13

29 USCA 216(b) 2, 3

29 USCA 255 5

29 USCA 255(a) 3

29 USCA 256 ....3, 5, 12

Portal-to-Portal Act, Section 7 8

Rules

Federal Rules of Civil Procedure, Rule 20(a) 11

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Appellants,

vs.

Auto Rental Company, Ltd., and Thacker Transportation Co., Ltd.,

Appellees.

On Appeal from the United States District Court for the District of Hawaii.

REPLY BRIEF FOR APPELLEES.

JURISDICTION.

Jurisdiction of the United States District Court for the District of Hawaii was invoked under 28 USCA § 1337. Jurisdiction of this Court is conferred by 28 USCA § 1291.

The judgment of the District Court that the plaintiffs were not "engaged in commerce" within the meaning of 29 USCA § 207(a) with the order dismissing the

complaint, filed in the District Court on May 2, 1956, is appealable to the United States Court of Appeals for the Ninth Circuit pursuant to the provisions of 28 USCA § 1291.

The pleadings necessary to show jurisdiction in this Court are as follows: (a) Complaint (R. 2); (b) defendants' answers to the complaint (R. 6, 16); (c) stipulation and order for entry of judgment and judgment (R. 142); (d) notice of appeal (R. 147); and (e) statement of points on which Appellants intend to rely (R. 149).

STATUTORY PROVISIONS INVOLVED.

This case arises under the Fair Labor Standards Act, 1938 (52 Stat. 1060, 29 USCA § 201, et seq.), hereinafter called the "Act". The pertinent provisions of the Act are as follows:

> 29 *USCA* § 216(b)
>
> "(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."
>
> 29 *USCA* § 207(a)
>
> "(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

29 *USCA* § 216(b)

"(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

29 *USCA* § 255(a)

"Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

"(a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;"

29 *USCA* § 256

"In determining when an action is commenced for the purposes of section 255 of this title, an ac-

tion commenced on or after May 14, 1947 under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—

"(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

"(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced."

STATEMENT OF THE CASE.

This action was brought by certain employees of the Appellees engaged during the period of employment encompassed by the complaint in driving equipment owned by the Appellees and devoted to transportation of persons on the Island of Oahu, Territory of Hawaii, including transportation to and from the Waikiki district of Honolulu, and Honolulu itself, and the Honolulu piers and Honolulu Airport, and also sightseeing tours around various areas of Honolulu and the Island of Oahu.

The complaint was filed on December 10, 1954. Written consents of persons named in the complaint were

filed in the District Court on September 6, 1955. In a preliminary proceeding the District Court ruled that under the provisions of 29 USCA § 255 and § 256, the statute of limitations continued to run on the claims of the plaintiffs named in the complaint until such time as the individual named claimant's written consent was filed with the Court. This ruling of the District Court is challenged by the Appellants herein.

By agreement of the District Court and the parties the question of coverage within the meaning of 29 USCA § 207(a) and § 203(b) of the Act as to certain named plaintiffs engaged in driving so-called ''airporters'' was tried first (R. 31-34), it being recognized that if the named plaintiffs were found not to be within the coverage of the Act pursuant to the provisions of said sections, this would be dispositive of the entire complaint.

The evidence adduced showed that the employees-Appellants herein transported passengers arriving and departing from Honolulu Airport by various airlines, and arriving in and departing from Honolulu by ship; that such passengers were transported to and from hotels and apartments through the Waikiki area and hotels in the business area of Honolulu; that agreements existed between several airlines and Appellees covering rates and availability of equipment to transport passengers and crews, but that there were no agreements with other airlines with respect to transportation of passengers, whose passengers were also carried by Appellees; that airline and ship passengers could secure ground transportation on the Appellees'

vehicles in any of three ways: (1) by booking space in advance through mainland or local travel agents with cash or charge procedures following arrival (hereinafter sometimes referred to as "prebooked"); (2) prepayment of the fare to such travel agents in exchange for a redeemable coupon or voucher good for transportation to or from the airport on any Appellees' equipment (hereinafter sometimes referred to as "prepaid"); and (3) payment of cash fare on a space availability basis; that the prepaid vouchers or prebooking was made through many independent travel agencies throughout the mainland, including several airlines, which had established travel agency departments; that many of the airlines whose passengers were transported had no travel agency department issuing such coupons or vouchers; that the unused coupons or vouchers were redeemable in cash or could be used as a credit in purchasing from Appellees sightseeing tour tickets for island tours or other transportation on Oahu, and, if not used for transportation on arrival, could be used later for transportation to the airport or docks for any purpose; that the "airporter" equipment transporting passengers to the Waikiki area would proceed to the tourist hotels and apartments within the area stopping anywhere the streets would accommodate them; that transportation was available from the airport or from Waikiki or the port of Honolulu on a space availability basis for any coupon or voucher holder, or a cash fare, without regard to particular flights or particular airlines, including those with whom Appellees had no arrangement to supply transportation to passengers; that crews of airplanes were transported to hotels in Wai-

kiki at the direction and control of the captain as to any additional passengers to be carried; that passengers returning by reason of airplane engine failure would be transported as required at the expense of the airline, although this occurred irregularly; that on layover flights proceeding beyond Hawaii passengers of some airlines were taken in for a meal and returned at airline expense; that 70 per cent of the people coming to Hawaii both by plane and by boat have an airline ticket and a hotel reservation and do not have prebooked or prepaid ground transportation; that all vehicles are licensed locally as taxis, carrying taxi plates, and the Appellants are licensed as taxi drivers and must have such licenses to operate the "airporters"; that the fares charged by Appellees on the "airporter" and other equipment operated by it are filed with the Territorial utilities commission.

Additional facts established in the record and too lengthy to be summarized here are referred to hereinafter in the argument.

The findings and conclusions of the District Court on the question of coverage under the Act were made by oral ruling and are set forth in the Record, pages 138-141, inclusive. In summary, these findings and conclusions are (1) that the prepayment of fares pursuant to the vouchers had little, if any, relevancy to the coverage question under the Act; (2) that the agreements in evidence between some of the airlines and Appellees were nothing more than an expression by the airlines of a desire to convenience their passengers and facilitate expedition of their own airline business with respect to

prompt arrivals and departures; (3) that these same agreements did not bind incoming or outgoing passengers to take these particular airporter busses; (4) that the airporter busses were available to others on a cash basis, space being available; (5) that at the terminus end of the transportation in Waikiki the airporter busses would stop anywhere that the streets would accommodate them; (6) that the airporter bus vehicle is an elongated seven-passenger sedan made to carry some thirty or forty people [sic], the length of the vehicle being such as to be incapable of being accommodated on some of the narrow streets of some parts of Waikiki; (7) that the airline passengers arrive at their destination when they have alighted from the airplane at the Honolulu airport; and (8) that the certain named drivers, Appellants herein, were engaged in purely local commerce of a taxi-like nature and were not engaged in commerce within the meaning of the Act.

ARGUMENT.

I. THIS ACTION WAS NOT COMMENCED AS TO NAMED PLAINTIFFS, APPELLANTS HEREIN, UNTIL SUCH TIME AS THEIR WRITTEN CONSENTS TO BECOME PARTIES WERE FILED IN THE DISTRICT COURT BELOW.

Appellants contend that this action should be deemed to have commenced as to the named plaintiffs as of the date of the filing of the complaint, rather than the date when the named plaintiffs' written consents to become parties plaintiff were filed in court. The plain wording of Section 7 of the Portal-to-Portal Act permits no

such construction. This section, 29 USCA § 256, reads as follows:

> "In determining when an action is commenced for the purposes of section 255 of this title, an action commenced on or after May 14, 1946 under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—
>
> "(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or
>
> "(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced. May 14, 1947, c. 52, § 7, 61 Stat. 88."

The requirements of this section could not be more specifically spelled out as to when a collective or class action is to be deemed to commence for purposes of the two-year statute of limitations contained in Section 255. Such an action is to be considered commenced as to any individual claimant as of the date the complaint is filed only if (1) the individual claimant is specifically named as a party plaintiff, *and* (2) such claimant's written consent to become a party plaintiff is filed in the court on *such date* as the complaint was filed. Subsec-

tion (b) is clearly intended to cover exactly the situation here presented as one of the situations that were to be anticipated in collective or class actions; namely, if the complaint is filed specifically naming individual claimants as parties plaintiff but a written consent for an individual named claimant was not filed concurrently, then as to such individual claimant, the action is commenced on the subsequent date on which such written consent is filed.

That this is the proper construction and application of the statute is clear from the following cases:

Drabkin, et al. v. Gibbs & Hill Inc. (USDC, SDNY, 1947) 74 F. Supp. 758;

Burrell v. LaFollette Coach Lines (USDC, Tenn., 1951) 97 F. Supp. 279;

Lindell v. General Electric Co. (Wash. Sup. Ct., 1954) 267 P. 2d 709.

Appellants argue that the conjunctive "and" in subsection (a) should be read as "or". This, they contend, would fulfill the purpose of the statute which, the Appellants state, requires the filing of written consents in order to insure the defendant employer of notice of individual claims. And such notice, they say, is already adequately served by naming of the parties without filing consents. They also say that reading "and" as "or" in subsection (a) would thereby be consistent with the "or" used in subsection (b). The answer to this is that subsection (b) covers entirely different situations from subsection (a). Appellants also miss the fact that one basic purpose of the requirement of written consents is the specific purpose of determining the applicability of

the statute of limitations. As the court states in *Burrell v. LaFollette Coach Lines, supra,* page 283:

> "One purpose in naming the parties plaintiff in the initial pleading is to apprise the defendant of individuals against whom he must prepare his defense. In the *Drabkin* case, however, the court pointed out that the requirement for the written consent of the named plaintiffs has a purpose beyond that of notice. The more specific purpose is that 'of determining the applicability of the statute of limitations.' "

Congress did this by anticipating a variety of situations in collective and class actions and providing for them accordingly by a statute that is clear on its face and must be applied accordingly.

Appellants attempt to claim that the complaint does not present a collective or class action but should be construed as a joinder of individual plaintiffs under Rule 20(a) of the Federal Rules of Civil Procedure, and individual written consents should not therefore be required. The cases cited by them as authority for this approach present entirely different pleadings. In *Deley, et al. v. Atlantic Box and Lumber Corp.,* (USDC, NJ, 1954), 119 F. Supp. 727, four named plaintiffs brought the action, each suing in separate counts. So also in *MacDonald v. Martinelli* (USDC, NY, 1950), 120 F. Supp. 382, cited by Appellants, the action was brought by named individual employees in their individual capacities and for their own individual benefit respectively. As the court there states (p. 383): "[The action] was not brought for and in behalf of other employees similarly situated." And in *Deley, supra,* the court dis-

tinguishes those cases in which an action is filed by an employee or employees in behalf of himself or themselves and other employees similarly situated. Here the very caption of the complaint of Appellants below prevents the application of the authorities they cite. The caption of the complaint names "Ernest Mateo [and others], on behalf of themselves and on behalf of other employees of the defendants similarly situated" as the plaintiffs. The complaint does not set forth separate claims; it is signed by the attorney himself as "Attorney for Plaintiffs."

In *Burrell v. LaFollette Coach Lines, supra,* the original complaint was filed on behalf of 32 named plaintiffs "and all other persons and employees of defendant who are or were similarly situated." It was signed by attorneys for the plaintiffs and sworn to by Burrell, one of the named plaintiffs. The court ruled that as to the plaintiff who had sworn to the original complaint, this constituted compliance with the requirement of written consent; that as to the others, it was clear that an attempt to make it a class action was indicated by "and all other persons and employees of the defendant who are or were similarly situated." As to all other named plaintiffs, therefore, the action was dismissed, no consents having been filed pursuant to Section 256 as to such specifically named plaintiffs.

The ruling of the Court below that, as to the named plaintiffs, Appellants herein, this action was not commenced, for purposes of determining the application of the statute of limitations, until such time as their writ-

ten consents to become parties plaintiffs were filed in court should be affirmed.

II. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE CERTAIN NAMED EMPLOYEES, APPELLANTS HEREIN, WHO WERE ENGAGED IN OPERATING SO-CALLED "AIR-PORTERS" TO AND FROM HONOLULU AIRPORT (AND PORT OF HONOLULU) AND THE WAIKIKI AREA OF THE CITY OF HONOLULU, WERE ENGAGED IN LOCAL COMMERCE AND WERE NOT ENGAGED IN COMMERCE WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED. (29 USCA § 201, ET SEQ.)

We are here concerned with the limitations upon the phrase "engaged in commerce" in 29 USCA § 207(a) as distinguished from the phrase "engaged . . . in the production of goods for commerce" in the same section. The leading case of *McLeod v. Threlkeld,* 319 U.S. 491, 87 L.Ed. 1538, defines the test here to be considered as follows (p. 497):

> "The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it."

The District Court concluded from all of the evidence adduced that the Appellants herein were engaged in purely local commerce of a taxi-like nature and were not engaged in commerce as the phrase is used in the Act (R. 141). The District Court recognized that the basic question presented was that of drawing the line between the reach of the federal power intended by

Congress under the Act and that area of local commerce in which it can be said that activities of employees are not so closely related to the movement of interstate commerce as to be a part of it.

In *Overstreet v. North Shore Corporation,* 318 U.S. 125, 129, 87 L.Ed. 656, 660, the Supreme Court states that "in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations," and in *United States v. Yellow Cab Co.,* 332 U.S. 218, 231, 91 L.Ed. 2010, the Supreme Court states (p. 231):

> "But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. Swift & Co. v. United States, 196 US 375, 398, 49 L ed 518, 525, 25 S Ct 276; North American Co. v. Securities & Exch. Commission, 327 US 686, 705, 90 L ed 945, 958, 66 S Ct 785. And interstate journeys are to be measured by 'the commonly accepted sense of the transportation concept.' United States v. Capital Transit Co. 325 US 357, 363, 89 L ed 1663, 1669, 65 S Ct 1176. Moreover, what may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey. We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations."

The Supreme Court there held, in part, that the transportation by taxicab of persons and their luggage to and from their homes, offices and hotels in Chicago and the railroad stations where they departed or returned on interstate journeys was too unrelated to interstate

commerce to constitute a part thereof within the meaning of the Sherman Act. The transportation was supplied on an intermingled basis with the local operations of the taxicabs. The significant point is that it was that allegedly interstate part of the business upon which the government rested the validity of the complaint and which the Supreme Court found too unrelated to interstate commerce to constitute a part thereof.

A. The activities of the Appellants herein must be viewed against the background of the transportation furnished.

The District Court properly viewed the evidence in the light of this principle of the "intensely practical concept drawn from the normal and accepted course of business." Hawaii is known the world over as a tourist paradise, and is a terminus for tourists arriving daily by plane and by ship for vacations. Travellers arrive at their destination, the terminus of the transpacific journey, as the District Court phrased it, where in local parlance they are greeted at the airport with flower leis and hula girls and have available the facility of sending a radiogram home that they have arrived safely in Hawaii (R. 141). The same is equally true of the tourist passengers, businessmen and returning Island residents disembarking from any of a multitude of ships at the docks in Honolulu to be greeted with music and leis amidst welcoming crowds. Tourist hotels increase in number yearly throughout Waikiki and other areas of Hawaii to meet the requirements of the ever-increasing tourist industry (R. 78, 79). It is in this background that Appellees and other ground transportation companies, as well as airlines, steamship companies and

hotels engage in the intense competition of obtaining the business of the travelers to Hawaii.

During the period of employment of the Appellants, the Appellees competed with at least two other ground transportation operators entering the airport to pick up or deposit prepaid or prebooked passengers. These same operators and others were picking up cash fares in a variety of equipment (R. 87). Appellees' airport equipment and other equipment were used to transport steamship passengers to and from the Honolulu docks and the hotels. "Airporter" equipment was occasionally used with other equipment for sightseeing tours on the Island of Oahu (R. 88, 89).

Appellees competed with other companies for cash fares (R. 99) and were in direct competition with other companies for prepaid and prebooked transportation (R. 87, 100). Appellees deal with several hundred independent travel agencies throughout the country (R. 109). The travel agent is arranging air or ship transportation, tours to the other islands of the Territory of Hawaii, ground transportation, tours of the Island of Oahu, and hotel reservations throughout the Territory (R. 43, 109). During the period involved in this proceeding *some,* but not all, airline companies had separate departments acting in every capacity that a travel agent does. Ground transportation coupons or vouchers issued by an airline were therefore the same type of coupon or voucher sold by independent travel agents (R. 85). Approximately 70 per cent of the travellers coming to Hawaii by plane and by ship have an airline

or steamship ticket and a hotel reservation (R. 102, 123). They do *not* have prebooked or prepaid coupons or vouchers for ground transportation. This 70 per cent left the plane or ship and took the nearest cab or conveyance. The remaining 30 per cent are prepaid or prebooked. *From* the hotels *to* the airport the preponderance of the passengers were cash fares (R. 93). The prepaid and prebooked coupon system applied in the same manner with respect to passengers arriving by ship (R. 86). Tours in Appellees' equipment, or that of other carriers, were arranged by the multitude of independent travel agents, on a prebooked or prepaid coupon basis, prior to the tourists' departure from the mainland, whether the tour was an "around the island" tour, some scenic tour in Honolulu, or a tour of Pearl Harbor (R. 109).

Unused ground transportation coupons, which would include airport-to-Waikiki, or the Honolulu dock area and Waikiki, and vice versa, were redeemable in cash or could be credited to the purchase of island tours arranged subsequent to arrival in Hawaii (R. 84). The travel agent on the mainland, or in Hawaii, might or might not include a coupon for transportation to the hotel when he arranged transportation; this depended upon the desires of the traveller (R. 81-83). If the traveller had friends meeting him at the airport or dock he might purchase only the transportation to Hawaii and have his hotel accommodations prearranged (R. 84). Or, the traveller arriving and met by friends or members of his family could redeem the coupon or voucher for cash (R. 84).

B. The prebooking or prepayment of ground transportation is not a factor properly relevant to any determination that these Appellants can be said to be "engaged in commerce".

On the basis of all the evidence, the District Court concluded that the prepayment of fares was not relevant to the question of whether or not the employees operating airporter busses were engaged in interstate commerce. The record amply supports this conclusion. It is clear that these were but a phase of the development of additional business as between the interest of the Appellees in promoting ground transportation anywhere on the Island of Oahu and the interest of a multitude of independent travel agencies on the mainland with whom the Appellees had established connections. From the viewpoint of the travel agent, the possibility of sale to a traveller of a coupon for ground transportation which the traveller might or might not decide to take was in no different category than the travel agent's prearrangement of a variety of tours while on the Island of Oahu or in the Territory, or prearrangement of hotel reservations. The travel agent was promoting the business in the interest of his commissions. It is also established by the record that the airlines, in making sales of such coupons or prearranging the transportation, had an identical interest with that of the independent travel agents, and functioned merely through a travel agent department which, as to them, the evidence showed was a relatively recent development by reason of the establishment of such department (R. 85, 96). Moreover, the fact that the coupon was exchangeable for cash or could be applied to other tour transportation (R. 84) and could also be used on other equip-

ment than that driven by Appellants, while any traveller could hire transportation on the "airporter" at the same price as the coupon holder (R. 54, 55, 56, 69, 84), clearly establishes the immateriality of the use of such coupons in relationship to the issue here in question.

Clearly, the injection of prebooking and prepaid coupons by reason of the development of the travel agency business provides no valid basis to conclude that the transportation of these passengers by Appellees is thereby removed from the entire general pattern of local transportation service to an integrated connecting link of interstate commerce. In choosing to rely upon *Cederblade v. Parmelee Transportation Co.,* 94 F. Supp. 965 (N.D. Ill., 1947), the District Court could properly consider these prepaid coupons and prebookings as inconsequential.

C. The agreements between the Appellees and several airlines do not create such a contractual arrangement with an interstate carrier to thereby establish transportation to and from hotels and the Waikiki and Honolulu areas as an integral stop in the interstate commerce movement.

Appellants, and the Secretary of Labor in his brief, attempt to have these agreements identical with those in *Airlines Transportation Inc. v. Tobin,* 198 F. 2d 249 (CA 4, 1952). The record simply does not support this. On the contrary, the District Court properly concluded that these agreements were for an entirely different purpose. Admittedly, many provisions of the agreements in evidence were similar; practically, however, the agreements here were but one element of the "catch-

as-catch-can" of competition of local taxi and tour operators for fares. In effect, the District Court therefore properly concluded that the existence of these agreements did not constitute a factor in the determination of engagement in commerce by these employees-Appellants "airporter" drivers.

In the *Airlines Transportation* case it was provided that the limousines would be used exclusively in the services of the contracting airlines (p. 250 of the opinion). Nothing could be further from the facts here established. They were used to transport travellers by ship to and from the docks in Honolulu (R. 88, 89); they were used for tours when cruise ships arrived or tour parties (R. 89). Basically, the equipment driven by Appellants was merely a part of the fleet of equipment that Appellees used in carrying any and all fares they could pick up, whether to and from the airport, to and from the docks, or sightseeing tours. The only agreements relative to availability of equipment for *deplaning* passengers were with United Airlines and Pan American Airways. Agreements with other airlines, Canadian Pacific, Northwest Airlines, B.C.P.A., related only to transportation of crews (R. 125). The manager testified that there were peak periods of arrivals and departures that occurred commencing at 6:30 to 7:00 in the morning and continuing to 9:00 or 10:00 in the morning. A further peak period occurred in late afternoon and evening (R. 95). And the method of operation is well illustrated by the testimony of the Appellees' manager concerning the handling of prepaid or prebooked fares. In answer to a question directed to

ascertain whether preference was given to coupon or charge traffic, the manager testified (R. 107):

> "A. Well, the company policy would naturally be to go out and take care of your prepaid and your prebooked people. However, the way we did it, if a plane were coming in, for example, with 50 people aboard, we would have, let's say, 8 or 10 prebooked, and we would know that there would probably be a certain percentage of the rest that we would get. So we would send equipment out there on speculation to try and take care of as much of the casual business as possible."

This is a graphic illustration of the method of the entire operations. With contracts with some airlines, and not with others, with passengers arriving throughout two relatively long peak periods of the morning and early evening, the objective of the business was to get equipment to the airport and take care of as much as possible. This is in complete contrast to the exclusive agreements in the *Airlines Transportation* case.

Further, in *Airlines Transportation* the court tied the beginning and the end of the interstate journey to the Parmelee system, which the Supreme Court, in *Yellow Cab, supra,* had found to be a connecting link in interstate commerce. The court then stated (p. 251):

> "But the arrangement for the carriage of the passengers is made by air line carriers . . ."

In the instant case only two of many carriers had any such arrangement (R. 125); the arrangements pertained only to deplaning passengers (R. 123); and the Hawaii Aeronautics Commission refused to recognize (R. 123) such agreements. Transportation at the ter-

minus of the journey for passengers of the other airlines was therefore left to the passengers to arrange for and employ such facilities as they saw fit, of which those of the Appellees were only one. The arrangements for carriage of prebooked and prepaid passengers here were, in effect, made with travel agents (and some airlines functioning as such), and the Appellees and were not, therefore, in any way part of the contractual arrangement with the carrier as such; moreover, they were not attributable to any agreement with the carrier for availability of transportation. The very fact that the passenger was not obligated to use Appellees' equipment after arrival on any airline with whom Appellees had agreements for availability of equipment further supports the essentially local nature of the transportation offered.[1]

Without belaboring the point further, we submit that the District Court properly concluded from all the evidence adduced that the agreements with two airlines at the Honolulu Airport do not establish the foundation of any integration into interstate commerce of a trip by "airporter" to a hotel of the passenger's own choosing.

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[1]The evidence also shows that Appellees had arrangements with various airlines to provide transportation for crews also. The airporters so provided were at the disposal of the captain of the crew (R. 72, 73, 90). Appellants do not press argument on this factor. Such a factor in Appellees' operations and Appellants' activities are not significant, Appellees submit, in view of the ruling in *McLeod v. Threlkeld*, 319 U.S. 491, 87 L. Ed. 1538. The same ruling appears equally applicable to the isolated and irregular cases of transportation of passengers to hotels on flight returns for engine maintenance.

D. The fact that the evidence establishes that the ''airporters'' would pick up or drop passengers virtually anywhere in the Waikiki area, depending upon the accommodation of the streets, further supports the conclusion that this transportation is essentially local in character.

The District Court so concluded and the evidence and the record amply support this conclusion. One of the drivers-Appellants herein testified (R. 78, 79) that the ''airporters'' would drop as well as pick up passengers throughout the various hotels and apartments in the whole Waikiki district, limited to the extent that they could not go down the small, narrow streets since they could not get the equipment through. It further appears clear that no true distinction can be made by reason of the nature of the equipment since, as the record shows, the equipment was merely an elongated passenger vehicle which would thereby accommodate eleven passengers, utilized as a matter of pure business economics—more passengers carried with fewer drivers (R. 99). In the utilization of the equipment in the Waikiki area as well as at the airport and the docks, dispatching was coordinated with an airport dispatcher as well as a Waikiki dispatcher, who were at the same time coordinating other transportation, including smaller taxicabs to and from hotels and all over Waikiki as well as other equipment at the airport (R. 94). These additional factors further distinguish the facts here presented from those in *Airlines Transportation, supra,* and the equipment and the system of dispatching there used.

E. On the basis of the entire record, the District Court properly found that the employees-Appellants herein are engaged in local operations preceding or following interstate travel and that such operations do not constitute an integral part thereof within the meaning of the Act.

The District Court accepted the ruling in *Cederblade v. Parmelee Transportation Co., supra,* in which the operation of busses between downtown Chicago and the airport, transporting passengers and baggage in both directions, the passengers paying the carrier directly for the fare, was held not interstate commerce and employees engaged therein were not covered by the Act. With respect to the airport bus operations in this case, the court there stated (p. 969), in referring to the decision of the Supreme Court in *United States v. Yellow Cab, supra:*

> "I think, however, that the real rationale of the opinion [Yellow Cab] lies in the Court's discussion of the intensely practical concept (of interstate commerce) drawn from the normal and accepted course of business. In this connection, the Court drew the distinction, which I have previously mentioned, between interstation transfer of interstate travelers, which is in the stream of commerce, and hauling passengers to and from stations and terminals, which is a local operation preceding or following the interstate journey and not an integral part thereof."

Subsequent decisions, we submit have not changed this principle so enunciated and clearly applicable in the instant case. The Secretary of Labor, in his *amicus* brief, makes considerable point of the fact that a later decision of the Supreme Court in *U.S. v. Capital Transit Company,* 338 U.S. 286, 94 L. Ed. 93, effected a mod-

ification of this principle so far as a situation such as here presented is concerned. We disagree. In the majority opinion itself in the *Capital Transit* case, the Supreme Court reaffirmed *Yellow Cab* in stating (page 290) that the decision in *Yellow Cab* was not in conflict with the prior holding in *U.S. v. Capital Transit Co.,* 325 U.S. 357. Nor does the second *Capital Transit* decision, following an obvious attempt on the part of the transit company to avoid the effect of the Court's prior ruling, present a situation in any way analogous to that presented in the instant case. It is apparent from the facts in the second *Capital Transit* case that the passengers there had not *completed* the interstate journey to the *place they* intended to arrive at. That is not the situation presented here, since in common parlance a passenger clearly arrived in Hawaii at the airport or at the dock in Honolulu just as he has arrived in Chicago at the Dearborn Street or any other station. Nor, as we have shown, does the evidence here establish any such contractual arrangements to change this basic fact. Such contracts as there are here have already been clearly distinguished from those in *Airlines Transportation* so that the ruling in that case is not a proper precedent to be applied in this case.

To extend the ruling in *Airlines Transportation* to the situation presented here and find the Appellants herein to be "engaged in commerce" would, we submit, be an unwarranted extension of the reaches of the Act. In *Walling v. Jacksonville Paper Company,* 317 U.S. 564, 87 L. Ed. 460, the Administrator argued for a ruling of interstate commerce coverage not only with respect to goods moving "pursuant to a prior order, con-

tract or understanding," but also with respect to business with customers generally forming a fairly stable group whose orders were recurrent as to the kind and amount of merchandise, the Manager being able to estimate with considerable precision the needs of his trade. The Supreme Court rejected such extension, stating that the Administrator had not sustained the burden, which was on the Petitioner, of establishing error in a judgment which the Court was asked to set aside. The Court concluded that the evidence in support of the Administrator's contention lacked "that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local disposition." Similarly, we submit that the Appellants are here asking an unwarranted extension of the Act which would violate that "intensely practical concept drawn from the normal and accepted course of business," which fundamental principle still obtains.

CONCLUSION.

On the basis of the foregoing, we submit that the rulings and the judgment of the District Court should be affirmed.

Dated, Honolulu, Hawaii,
November 17, 1956.

Respectfully submitted,
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